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Peace through justice? -
The International Criminal Court in The Hague

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This venue – the Military History Museum of Germany's armed forces – is certainly a good place to talk about what history can tell us on the topic of preventing war crimes. To start with I should therefore like to briefly remind you – and this quick run-through is not exhaustive – of a few dates which illustrate specific strands in the development of legal concepts and put the International Criminal Court into its historical perspective.

- 1859 – Moved by cruelty and suffering at the Battle of Solferino, Henry Durant writes his book "A Memory of Solferino" and proposes measures which lead to the founding of the International Committee of the Red Cross (ICRC).

- 1872 – The Swiss citizen Gustave Moynier, Henry Dunant's immediate successor, drafts the first set of statutes for an international criminal court.

- 1907 – The Hague Convention regarding the laws and conduct of war on land lays the foundation for the present-day concept of war crimes.

- 1921 - 1927 – Most of the trials held in Leipzig against about 1,740 Germans accused of war crimes ended in the dismissal of proceedings. There were 6 convictions, 6 acquittals and not a single sentence was executed in its entirety.

- 1945/1947 – The international military tribunals at Nuremberg and Tokyo establish the principle of every individual's responsibility under criminal law for their actions, even if they are high-ranking representatives of the state or its military apparatus.

- 1948 – Art. VI of the Genocide Convention envisages the creation of an international criminal court.

-10 December 1948 – For the first time in the history of mankind, inalienable human rights which all states must protect against arbitrary or violent acts are recognised in the Universal Declaration of Human Rights proclaimed by the United Nations.

- 1949 – The four Geneva Conventions create the basis of modern international humanitarian law and set forth what is from now on forbidden to warring parties.

- 1993/1994 – Ad hoc tribunals are set up to deal with problems raised by the break up of Yugoslavia and conflict in Rwanda.

- 17 July 1998 – After endless efforts, truly incredible efforts, the Rome Conference finally reaches a successful conclusion. The founding treaty of the International Criminal Court, the Rome Statute, is adopted with 120 votes in favour, seven against and 21 abstentions. The US, Israel, Iraq, Libya, and three other countries voted against it.

The successful outcome of the conference in Rome confirms a famous saying by Victor Hugo, which our German delegation for the Criminal Court had taken, at my suggestion, as its motto and guiding principle: “Nothing is stronger than an idea whose time has come”.

This treaty, the Rome Statute, created the first standing international criminal court; Articles 6, 7 and 8 codify in comprehensive detail what constitutes genocide, crimes against humanity and war crimes. Our Court will prosecute these crimes when national criminal justice systems fail. The International Criminal Court is the first standing, universal, international criminal court and is designed for future needs, i.e. there is no selective jurisdiction and no “victors’ justice”. The Court is founded on the general principle of law that there is “Equality before the law, equal justice for all,” and on the free and voluntary support of the international community.

I am grateful to have the opportunity of speaking to you about the first six years in the life of our young Court – and to be able to do so in Dresden. Perhaps I

should mention that in many different respects my family history is closely tied to this city whose beauty has now been restored. My father, educated in the Saxon Cadet Corps, served from 1943 to 1945 as Adjutant Major to the last commandant of the city of Dresden, General Mehnert. He, together with several others, survived the night bombing raids of 13 to 15 February 1945 in the cellars of the Taschenberg Palace, where the commandant's offices were located. But other members of my family perished during these devastating air raids – by our current understanding of the law they certainly qualify as an especially serious war crime pursuant to Article 8 of the Rome Statute – one of the dead was my uncle Gerd, killed in the main station. Since I was born during the war in Glashütte, the first city I can remember seeing as a child in 1947/48 was the totally ravaged Dresden, a city littered with ruins where beaten tracks through the rubble served as streets – although at the time, as a small boy holding his mother's hand, I did not think it unusual. And I have another memory, this time of the historic visit of Chancellor Kohl to Dresden on 19 December 1989: the Chancellor was giving a short speech in front of the ruined Frauenkirche, every new sentence greeted by thousands of people shouting "Deutschland, Deutschland" and I, my heart thumping in my chest, was glued to the television in the German Embassy in Washington, because I had applied to take responsibility for the process of German unification there. And looking at the city now, one can say: Dresden, beautiful, beloved Dresden, risen from the ruins, a freshly blossomed beauty, the Frauenkirche standing once more – it's a miracle, and that is no exaggeration, it is truly a miracle …

I should like to address four sets of issues in my speech:

First, and to recap: what is the regime of jurisdiction, what are the most important basic principles of the International Criminal Court? When we talk of peace through justice, we must also know which institutions are to ensure this happens.

Second: what is the current state of the Court? What cases are now pending? What are the Court's limitations and what challenges does it face right now?

Third: What role does the Court play in relation to prevention of conflict and peacekeeping? Are there already concrete signs for such potential? And what

can we say about the relationship between efforts to maintain peace and criminal prosecution?
Fourth and finally: What is the outlook?

I. Basic principles

At the outset, it is important to recall: the International Criminal Court is not a comprehensive, global, super-court with competence to prosecute each and every serious crime.
On the contrary, the scope of the Rome Statute and of the International Criminal Court is limited by many compromises. The crucial principle on which the Rome Statute rests, and the one of utmost importance, is what is called the system of complementarity. This means that cases are admissible before the Criminal Court only if no state that has jurisdiction over a matter is willing or able to genuinely carry out the prosecution.
Art. 5 para. 1 of the Rome Statute states that the *ratione materiae* (subject-matter) jurisdiction of the International Criminal Court is exclusively limited to genocide (5 defined acts), crimes against humanity (15 defined acts) war crimes (50 defined acts) and the crime of aggression. However, the elements constituting this latter crime have yet to be defined and, moreover, clarification is needed in relation to the UN Security Council (see in particular Art. 39 of the UN-Charter which gives the Security Council the right to determine whether an act constitutes aggression) about the conditions under which the International Criminal Court can exercise its jurisdiction over the crime of aggression.
There are also limitations to the objective elements of the crimes in that in each case a specific dimension must be reached or a specific threshold crossed. Genocide pursuant to Article 6, for example, is always directed towards an entire national, ethnic, racial or religious group as such. To constitute a crime against humanity pursuant to Article 7, the element of a widespread or systematic attack against the civilian population is required of which the individual crimes must be part. The International Criminal Court has jurisdiction over war crimes pursuant to

Article 8 in particular if these are part of a plan or policy or are conducted on a large scale. This latter point means that an individual, isolated war crime perpetrated by one person or individual soldiers as a general rule will not be brought before the International Criminal Court.

With regards to the temporal jurisdiction, *ratione temporis*, the International Criminal Court has jurisdiction only in relation to acts that occurred after the Rome Statute entered into force on 1 July 2002. The International Criminal Court is thus not an institution for addressing historic injustices.

Its personal jurisdiction, *ratione personae,* is also very limited. In fact it is only given in three cases. Firstly, if the crimes were committed on the territory of a State Party; secondly if the perpetrator of the crime is a national of a State Party; and thirdly, if the Security Council has referred a situation to the International Criminal Court (as in the case of Security Council Resolution 1593 on Darfur/Sudan in 2005). At this juncture, I must stress that for a prosecution the International Criminal Court is totally, one hundred percent dependent on effective cooperation with States Parties, above all in the crucial matter of arrest and surrender of the suspect to The Hague. The International Criminal Court has no police of its own, no enforcement powers and no soldiers. Without arrests no criminal proceedings – and because the ability of the Court to function depends, ultimately, on arrests carried out by the States Parties, I shall return to this point later.

II. Status of the Court

What is the current status of the Court, how far are the structures in place, in the Registry, at the Office of the Prosecutor, in the Court's Chambers?

At the beginning things were difficult and modest: it had cost me, as Germany's chief negotiator, a considerable effort of persuasion before an advance team of five was able to enter a completely empty 15-storey office block in The Hague on 1 July 2002, the day the Rome Statute entered into force, to start the work of

establishing the Court. First job: to procure five telephones, five PCs and a fax machine, plus basic office furniture etc.

What is the Court's current situation, what has actually happened since 2002? I would like to recall in part important elements of the report that the President of the Court, fellow Judge Sang-Hyun Song from Korea, submitted four days ago, on 29 October, to the United Nations in New York:

The Court has already come a long way. The complete administrative infrastructure for the Chambers, the Office of the Prosecutor and the Registry had to be developed from scratch. Five "field offices" in African states and a UN liaison office in New York were opened. In the past few years the focus of activity has steadily shifted from establishing the Court to concrete action in prosecution and judicial matters. The Court's staff has grown from 5 to around 1000. Procedures for judicial cooperation are working increasingly well.

The Office of the Prosecutor, the Pre-Trial, Trial and Appeals Chambers of the Court are all fully functional and cope with a heavy work load. Three "situations" were referred to the Prosecutor by States Parties (Uganda, Democratic Republic of the Congo (DRC), and the Central African Republic) and one (Darfur/Sudan) was referred by the UN Security Council (the Prosecutor is currently looking into further situations, including some outside Africa such as Afghanistan and Colombia.) The judges issued fourteen arrest warrants or summons. At present three trials are being heard before the Court against four accused persons in the custody of the Court. The Pre-Trial Chambers have confirmed charges and Trial Chambers I, II and III have already opened the first main trials. In 2008 the judges handed down 702 decisions, totalling more than 9,000 pages. The Appeals Chamber gave final decisions on fundamental issues regarding the Statute. The Court processed more than 1877 applications from victims to participate in the proceedings, 743 victims were granted participation rights.

What cases are currently pending before the Court? We term a matter a "case" when a specific court record exists, in other words when a summons or arrest warrant against a specific, named person has been applied for or issued by

judges. If you agree to this definition, the International Criminal Court is currently seized of 14 cases: They relate to:

- Four high-ranking suspects from Sudan: the current holder of the office of President, Omar Hassan Ahmad Al-Bashir, the former minister for humanitarian affairs, Ahmad Muhammad Harun, and the Janjaweed leader Ali Muhammad Al Abd-Al-Rahman; arrest warrants have been issued for these men. A summons to appear was issued to the United Resistance Front leader Bahr Idriss Abu Garda on 7 May.
- Four accused persons from the Democratic Republic of the Congo. Thomas Lubanga Dyilo, Germain Katanga, Mathieu Ngodjolo Chui and Bosco Ntaganda. Lubanga, Katanga and Chui are already in the custody of the Court. The trial of the accused Lubanga started in January 2009, mainly on charges of recruiting child soldiers. The proceedings against Katanga and Chui will open on 24 November.
- Four leaders of what is known as the Lord's Resistance Army from Uganda, against whom arrest warrants were issued back in 2005. It is very regrettable that these arrest warrants have not yet been executed.
- Jean-Pierre Bemba, former Vice President of the Congo; charges against him have already been confirmed by Pre-Trial Chamber II – my own Chamber – and this man is also in our custody.

However, despite these successes, despite the progress, it remains extraordinarily difficult to make our institution a truly and fully functioning, universally recognised world court. Many people will need to continue making enormous efforts and be very patient.

Why is that so? There are many reasons. Perhaps I may again draw your attention to some of the characteristics and limitations inherent in the system that the Court simply has to live with and which even its leading representatives cannot alter, however much they might try.

First: a particular challenge is the unprecedented, indeed gigantic difficulty the Court faces in that, in order to obtain the evidence required, it has to conduct the necessary, complex investigations in regions thousands of kilometres away from

The Hague where travel is difficult and where there are often security issues. And then, when sufficient evidence has been collected to justify an arrest warrant, we crucially need the States Parties to be prepared to execute the warrants and transfer the suspects to The Hague.

Second: genocide, crimes against humanity and war crimes are usually committed during armed conflict as a result of orders “from the top” issued by all kinds of rulers, who at the same time make every effort to disguise their responsibility for the crimes. In pursuing its task, therefore, the Court will almost inevitably be caught between the poles of brutal power politics on the one side and the law and human rights on the other. Consequently, the work of the Court will often continue to be hampered by adverse political winds or indeed political reproach of every colour. For example certain elements within the Arab League in Cairo or the African Union in Addis Ababa repeatedly try to portray the Court as an allegedly anti-Arab or anti-African institution – a charge that my five African fellow judges roundly refute.

Third: it is likely that membership would be far higher than the 110 countries that have joined the Court if the Bush administration had not, from 2002 to about 2005/2006, embarked on its well-documented campaign to undermine the Court, aiming to discourage as many potential members as possible from becoming Party to the Rome Statute.

III. Peace through justice? -

I would now like to talk about some fundamental issues which are also very important to the judges at our Court, even when, in the daily work of dealing with the cases before the Court, the normal practice of a judge’s tasks is at the forefront of our interest. These questions include:

Is there a connection between the prosecution of international crimes and peace between nations? If so, what is the nature of this connection and how does the prosecution of crimes against international law affect international relations? Are there times, for example in an ongoing conflict, when peace must take

precedence over the law, because the prosecution of those in power would endanger efforts to make peace, because defusing the conflict requires the cooperation of these rulers or because warrants for their arrest would escalate the conflict again? Or is, on the contrary, the right course to be found in the programme statement that both Kofi Annan and Ban Ki-Moon have repeatedly stressed in recent years: “No peace without justice!”. Since the summer of 2008 many people have joined the debate about the relationship between peace and justice; the arguments are often passionate and diametrically opposed to each other, above all on the topic of Sudan/Darfur and on the topic of the warrant for the arrest of the Sudanese President Bashir issued by my colleagues in Pre-Trial Chamber I. I should now like to talk about my personal views on these matters.

The first point is basically self-evident. But perhaps it is still right to underline it again: the greatest responsibility for the preservation of peace and security in the world still rests with states, governments, and the United Nations Security Council. That is a fact and that is how it must remain. International courts, including the International Criminal Court, cannot do that job. All we can do is to prosecute and punish crimes against international law, acting in strict accordance with the Rome Statute as a non-political, purely judicial organisation that is objective, unbiased and neutral.

Secondly: the treaty that established our Court, the Rome Statute, explicitly recognises in Article 16 that in specific situations there may be a conflicting relationship, indeed a conflict of objectives, between political efforts to establish peace and international prosecution of crimes against international law. Article 16 states that the UN Security Council may, by passing a resolution under Chapter VII of the UN Charter, defer the activities of the International Criminal Court for 12 months, if the Council deems it necessary. However, all five permanent members of the Security Council must agree (i.e. there must be no veto from a permanent member of the UN Security Council) that the situation is such that it is justifiable to give precedence to political efforts. To date there has been no such agreement among UN Security Council members, not even when the warrant for Bashir’s arrest was issued.

Third: What about the frequently-voiced assertion that international criminal courts, which includes our court, are counterproductive to peacemaking work, in other words they actually stand in the way of peace and conflict-resolution?

The proponents of this theory say that by stubbornly prosecuting crimes, courts may hinder further negotiations and possible barter trades with rulers, which could have ended conflict and prevented further losses.

But, is it really not possible to strive for both peace and justice? Can our Court really be accused of preventing peace processes? Or are there signs that international criminal justice, above all in terms of prevention and deterrence, exerts a positive influence on conflict and can thus contribute to peace among states?

Three months ago in New York the respected US human rights organisation "Human Rights Watch" published its empirical study on this very issue – here it is, entitled "*Selling Justice Short: Why Accountability Matters for Peace*". This study examines developments in 20 countries where there has been conflict in the past 20 years. The findings of this study indicate that peace and justice are by no means diametrically opposed to each other – quite the contrary! That is clear from the German title of the report which translates into English as "Prosecuting violations of human rights – Waiving justice is often a high price to pay"*. I am sure you will appreciate that we do not have time today to make a reasonably correct summary of what is contained in this report (127 pages, but you can download the document from the Human Rights Watch website). But I would like to mention some of the report's findings that are largely in agreement with my own observations:

First: in practice it has emerged that as a rule the rejection of amnesties or other promises of non-prosecution do not lead to peace talks being broken off (for example, DRC, Uganda).

Furthermore, experience has shown that arrest warrants or prosecutions against rulers charged with crimes against international law are often the first stage in their fall from power (cases: Karadzic, Charles Taylor, Milosevic).

In practice it has been shown that political reticence instead of threatening to call rulers to account can actually encourage them to commit crimes against international law (Rwanda 1994).

In practice it has been confirmed that fair trials are a protection against history revisionists (please think also of Nuremberg 1945/46).

Experience proves that international accountability usually makes the states affected more acutely aware of the need to reinstate a functioning system of criminal justice in their country (see Bosnia, Uganda).

The next question: how much potential does our Court contribute towards securing peace through prevention and deterrence?

That is a difficult question; and far be it from me to venture on overly hopeful forecasts. To start with one has to remember that the true prevention and deterrence capabilities of courts in general and the International Criminal Court in particular should not be over-estimated. Even in the national context the existence of police, state attorneys and courts does not prevent perpetrators of a reckless and violent nature from committing serious crimes.

Moreover, it is difficult to quantify or prove the degree to which a court can prevent crimes. There are not, as yet, any empirical studies on the prevention of crimes due to the existence of international courts. In a sense, it may be said that the courts are successful in terms of prevention in light of the absence of serious crimes against international law and in the absence of victims of such crimes.

Therefore, there are no reliable data about the deterrent effect of the Court. But it is possible to find some concrete evidence suggesting that a crime-preventing effect of the Court does exist:

- Central African Republic: The publication of a press release in spring 2003 stating that the International Criminal Court had started investigations was - as has frequently been reported - a key factor in the decision of Congolese invaders to withdraw their invasion forces from the country.
- Ivory Coast: On 17 November 2004 the United Nations news service reported that urgent appeals for peace were broadcast on radio and television one day after the then UN special adviser Juan Mendez had

remarked that the situation there fell within the competence of the International Criminal Court.

- Uganda: When in 2005 warrants for the arrest of Joseph Kony and his four commanders were issued, the stream of recruits to his violent “Lord’s Resistance Army” dried up almost instantly; thereafter the group started to disintegrate and disappeared almost entirely.
- Colombia: Prosecutor Ocampo has repeatedly declared that the intensity and incidence of crimes in Colombia has declined since it became common knowledge that the Office of the Prosecutor at the International Criminal Court is continually assessing crimes committed in the country.
- Sudan: In 2007 the first warrants for the arrest of two Sudanese suspects were issued and thereafter - according to credible reports filed by UN observers - there was a noticeable decline in attacks on the civilian population of Darfur.
- Child soldiers: On 5 February 2009 the French newspaper “Le Monde” reported that the number of child soldiers in Africa was falling. The article’s author speculates that one of the reasons for this is the case against Thomas Lubanga (mainly on charges of war crime of using child soldiers). This, according to “Le Monde”, was a “stern warning” to all warlords that they could be punished for their use of child soldiers.

One last point: the International Criminal Court seeks to make the chief perpetrators accountable, the perpetrator behind the perpetrators, those who give the orders, the political and military leaders suspected of being responsible for the most serious crimes. From experience we know that their standard argument is that their deeds and policies were in pursuit of legitimate political objectives. I am aware that the work of the International Criminal Court will usually hover on the border between the law and politics. And this awareness colours my personal view: it should, no, it must be perfectly clear to political and military leaders that there are limits, a Rubicon that must not be crossed.

The Rubicon is the question of whether they are prepared, for their own power-politics and aims, to cross the bridge that leads to international crimes such as

genocide, crimes against humanity or mass war crimes. If, however, it can be established that a delinquent leader has crossed this bridge, this Rubicon, and that mass crimes are the result, this must represent his bridge of no return, just as it was at the Nuremberg trials in 1945/46.

IV. Perspectives and outlook

A few words in conclusion: our modern international criminal law and the International Criminal Court are novel attempts to strengthen universally recognised human rights. A realistic view is, however, that these rights are continuously caught between the poles of what seems to be a never-ending battle between brutal force and the striving to increase the rule of law. The impact of so-called *Realpolitik*, cynicism, and disdain for the law, and related setbacks or disappointments will – we have to suppose – persist in repeatedly calling into question the body of international criminal law. Moreover, whether the International Criminal Court can serve to prevent crimes in the manner hoped for depends on many other factors.

Above all the Court needs sustainable political and practical support from its States Parties, which will soon, I hope, number more than the current 110. In particular that refers to the central, indeed crucial issue of support in arresting suspects and transferring them to The Hague.

Permit me please to repeat what I first said in an interview on 9 December 2008 and have repeated in public several times since then:

“The States did not want the International Criminal Court to have its own powers of arrest. Therefore they have to form special units to make arrests for our Court, or place national structures at our disposal. If a penal system is, over a period of time, unable to enforce arrest warrants against those suspected of the most serious crimes, it risks becoming a paper tiger.”

Basically the matter is a simple one: no arrest, no trial. No trial, no prevention and no deterrence.

Allow me to finish with a warning that I have already given many times before:

compared with the problems and violent crises in this world, the Court will always be small and weak, more symbol than might. If only for reasons of cost and capacity, the Court will never be able to do more than conduct a few, exemplary trials.

But, today those who strive for more international justice, for the protection of human rights, including the use of international criminal courts, have a considerably better chance of making progress and seeing their hopes realised than in the 19th and 20th centuries. Observers such as myself see clear signs that the Rome Statute's definitions of legal standards and punishable acts are already effective and are becoming increasingly recognised. The examples named show that the Court does indeed have the potential to prevent crime.

Therefore the most important thing now is to stay the course, despite all the difficulties and problems. If one remembers that in 1996 the International Criminal Court was just a Utopian dream, and if one then looks at what has been achieved since then, one thing stands out clearly: our work is anything but a hopeless undertaking.

Thank you very much.